Electronically Filed
Docket: 14-CRB-0010-CD/SD (2010-13)
Filing Date: 01/29/2018 04:46:58 PM EST

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	CONSOLIDATED DOCKET NO.
Cable Royalty Funds	)	14-CRB-0010-CD/SD
	)	(2010-2013)
In the Matter of	)	
	)	
Distribution of	)	
Satellite Royalty Funds	)	

MULTIGROUP CLAIMANTS' OPPOSITION TO MPAA MOTION TO QUASH DISCOVERY REQUESTS OF MULTIGROUP CLAIMANTS

Multigroup Claimants ("MC") hereby submits its *Opposition to MPAA Motion to Quash Discovery Requests of Multigroup Claimants* in the above-captioned proceeding.

ARGUMENT

A. THE MPAA'S MOTION TO QUASH MULTIGROUP CLAIMANTS' DISCOVERY RESTS ENTIRELY ON THE JUDGES' RULING ON THE "JOINT MOTION TO STRIKE MULTIGROUP CLAIMANTS' WRITTEN DIRECT STATEMENT", AND NO OTHER BASIS. THE MPAA AND SDC HAVE PREVIOUSLY PARTICIPATED IN SUBSTANTIALLY SIMILAR PROCEEDINGS, WITH NO CONSEQUENCE TO THE CLAIMS OF THE PARTICIPANT, AND MISREPRESENTED SUCH FACT TO THE JUDGES.

The Motion Picture Association of America ("MPAA") previously moved to strike MC's Written Direct Statement in the above proceedings, and dismiss all MC-represented claims for 2010-2013. As is immediately apparent, the entire basis of the MPAA's *Motion to Quash Discovery of Multigroup Claimants* rests on the outcome of that previously-submitted motion, and no other grounds.

Presumably, the MPAA believes that the Judges are not sufficiently astute to recognize

the MPAA's gross mischaracterization of Multigroup Claimants' written direct statement. That insulting fact is the only reasonable explanation for the MPAA's repeated statement that Multigroup Claimants "did not file" a written direct statement.

For risk of being repetitive of the arguments set forth in Multigroup Claimants' *Opposition to Motion to Strike the Written Direct Statement of Multigroup Claimants*, Multigroup Claimants ***has*** filed a written direct statement in the distribution phase, ***has*** included all of the required elements, and ***has*** identified the distribution methodologies to which it will accept. While the MPAA asserts that MC's written direct statement failed to submit to a distribution methodology, such was not the case. MC did not present a "uniquely constructed" distribution methodology that was constructed by MC, but expressly stated that MC has agreed to "*accept the results of methodologies submitted by adverse parties in these proceedings"*. As is clear from all statutes and regulations pertaining to the filing of written direct statements, no obligation exists to submit to *any* particular distribution methodology as part of any written direct statement, yet MC nonetheless did so. See 37 C.F.R. § 351.4(b).

In fact, Multigroup Claimants' situation is not unique. When Multigroup Claimants responded to the *Joint Motion to Strike Written Direct Statement of Multigroup Claimants*, filed by the MPAA and the SDC, Multigroup Claimants was able to identify at least one proceeding in which the SDC presented no distribution methodology, yet such fact did not affect the claims of the SDC under a competing party's methodology (IPG's), or the SDC's entitlement to engage in rebuttal directed toward IPG's proposed methodology. See *Multigroup Claimants' Opposition the Joint Motion to Strike Written Direct Statement of Multigroup Claimants* (Jan. 17, 2018), *citing* 2000-2003 cable proceeding (Phase II). More on point, Multigroup Claimants has

identified yet *another* proceeding in which the SDC submitted no methodology, but different from the 2000-2003 cable proceeding (Phase II), the SDC affirmatively advocated application of another party's methodology – ***exactly as Multigroup Claimants has done in this proceeding***. See *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57075 (Sept. 17, 2010).

In the 2004-2005 cable proceeding (Phase I), the SDC advocated application of the JSC's sponsored Bortz survey, presenting no methodology of its own. In fact, the *only* testimony offered by the SDC was by witness Dr. William Brown, whose testimony was for the purpose of rationalizing the increase of devotional programming share under the Bortz survey since the 1990-1992 proceeding. As reflected by the decision, the Judges found Dr. Brown's testimony to unsubstantiated opinion, totally lacking in any value.1

The existence of this example is poignant for several facts. First, the Judges' decision makes abundantly clear that the SDC remained as a participant in the proceeding, and was awarded a share based on its claims. Second is the fact that both the MPAA and the SDC took part in such proceeding, including certain counsel of record for both parties in *this* proceeding. Consequently, the MPAA and SDC have sought to distort the precedent applicable to these proceedings despite firsthand knowledge that a party's advocacy of another party's methodology, without presentation of its own uniquely constructed methodology, has no consequence on the viability of claims. At a certain point, the Judges must accept that such is not mere advocacy, but

1 See *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57075 (Sept. 17, 2010) ("The testimony offered [by Dr. William Brown on behalf of the SDC] regarding growth of devotional programming and avidity and loyalty of devotional viewers was anecdotal in nature and comprised largely of unsupported opinion.").

a fraud on the Court, one that should not be taken lightly.

In any event, although Multigroup Claimants would never advocate doing so, nothing prohibits a party from asserting a claimed percentage or dollar amount to a fund, then asserting that it is based on nothing more than the unsubstantiated opinion of a sponsoring witness. As noted in the example above, the SDC has done *exactly* this in the past and, predictably, the results of such SDC "methodology" was found totally lacking in merit. Id. Nonetheless, such meritless methodology did not result in the dismissal of all SDC claims.2 Rather, it simply resulted in the Judges' adoption of an adversary's methodology.

Even ignoring the MPAA's knowing misrepresentation of precedent by seeking to strike Multigroup Claimants' written direct statement, an extraordinarily offensive aspect of the MPAA motion is the MPAA's repeated claim that by Multigroup Claimants not submitting a uniquely constructed methodology, and merely having an ability to check the MPAA's methodology by means of the rebuttal process, MC has obtained an unfair strategic advantage by "obtaining a preview of other parties' cases *before presenting its own*".3 MPAA motion at 2 (emphasis

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2 *Ergo*, in *Multigroup Claimants' Opposition to Motion to Strike the Written Direct Statement of Multigroup Claimants*, Multigroup Claimants observed that the moving parties would contend that even an outrageously dimwitted methodology would satisfy the requirements of a written direct statement, whereas acceding to a competing methodology would not.

3 As but another example of gross mischaracterization, the MPAA states, "Nor is MPAA aware of any instance where a party was permitted to sit on the sidelines of a distribution proceeding, watch other parties submit their own testimonies and exhibits advocating a distribution methodology, *and thereafter file its own testimonies and exhibits advocating a methodology for the first time in rebuttal, as MGC proposes to do in this proceeding*." MPAA motion at 2-3 (emphasis added). To support this statement, the MPAA cites to Multigroup Claimants' written direct statement, which says *nothing* about Multigroup Claimants intent or ability to submit its own methodology.

added). The only way for such statement to make sense is to mischaracterize a party's rebuttal against another party's written direct statement as a presentation of a uniquely constructed methodology, which it is not. Nevertheless, using this logic-starved assertion as its predicate, the MPAA conclude that by allowing MC to engage in *any* rebuttal to the MPAA-proposed methodology, i.e., allowing MC to engage in even the most meager fact-checking to verify whether the MPAA methodology generates the results it asserts to produce, MC is presenting "its own" methodology. Based on this ridiculous statement, the MPAA concludes that MC has presented a "placeholder pleading" – accusing Multigroup Claimants of the very act in which it is engaged. See infra.

B. THE MPAA NEVER INTENDED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS, HAS FILED A "PLACEHOLDER PLEADING", AND IS FORECLOSED FROM RAISING ANY FURTHER OBJECTIONS TO MULTIGROUP CLAIMANTS' DISCOVERY REQUESTS.

The Judges prior scheduling order in this proceeding gives no details about the schedule for discovery, directing only that discovery commence on December 29, 2017 and conclude on March 1, 2018. See *Order Consolidating Proceedings and Reinstating Case Schedule* (Dec. 22, 2017). Nevertheless, given the time typically required to review direct statements, draft discovery, respond to discovery, produce documents in response to discovery, analyze produced documents with the assistance of expert witnesses, submit "follow-up" discovery, respond to the "follow-up" discovery and produce documents in response thereto, a very tight timeline exists. The Judges provided only two months for all the foregoing to occur, and even with cooperating parties, this timeline would be difficult to accomplish. Nonetheless, on multiple prior occasions the task has been accomplished by cooperating counsel.

As should be expected, the Judges presumed that the parties and their counsel would act professionally and cooperate in this proceeding. The MPAA has not. In order to accommodate the Judges' scheduling order, and provide a schedule on which all parties could rely, Multigroup Claimants proposed a discovery schedule to the MPAA. Multigroup Claimants made the proposal *prior* to the submission of written direct statements, on December 21, 2017, and the MPAA simply did not respond. See **Exhibit A**. Following the aforementioned order consolidating proceedings and moving the filing date for written direct statements from December 22, 2017 to December 29, 2017, Multigroup Claimants revised the proposal in order to extend all the proposed dates by an additional week, and *again* submitted the proposed discovery schedule. See **Exhibit B**. Even prior to seeing Multigroup Claimants' written direct statement, the MPAA declined to agree, and already anticipating its intent to not cooperate with discovery in this proceeding, the MPAA refused to propose an alternative to Multigroup Claimants' proactive proposal.4 Id.

It is therefore ironic that the MPAA's motion alleges Multigroup Claimants' written direct statement is a "placeholder pleading", when the *only* party submitting a "placeholder pleading" in these proceedings is the MPAA.5 What is before the Judges, therefore, is a

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4 The basis provided by the MPAA to refusing to agree to a discovery schedule was its ostensible need to first see Multigroup Claimants' written direct statement. Nonetheless, in all prior proceedings, discovery schedules were proposed and agreed upon between the parties *prior* to the filing of written direct statements. That is, the MPAA never previously insisted that a discovery schedule was predicated on first seeing an adversary party's written direct statement.

5 Of course, it should not be lost on the Judges that in the Allocation phase of these proceedings, the MPAA has attempted to modify its written direct statement a few weeks prior to the trial proceeding, and yet in the consolidated 1999-2009 satellite/2004-2009 cable proceeding referred to Independent Producer Groups amendment to its written direct statement mere days after its initial filing as a "placeholder pleading". The mischaracterization of IPG's pleading was

circumstance in which the MPAA has filed a motion to quash based on an argument that is not only logically indefensible, but is without legal precedent ***and*** runs contrary to what has occurred in prior proceedings in which the MPAA was a firsthand participant. In order to push its indefensible argument along, the MPAA has misrepresented the law to the Judges, and mischaracterized Multigroup Claimants' ability to engage in the rebuttal phase of the proceedings as "a presentation of a methodology of Multigroup Claimants' own making". Taken in the context of the MPAA's clearly reflected intent to not engage in discovery *at all*, the MPAA's motion to quash is revealed for exactly what it is – a bad faith refusal to partake in these proceedings.

CONCLUSION

Multigroup Claimants timely propounded discovery requiring response from the MPAA no later than January 15, 2018. At this point, the parties are halfway through the defined discovery period, which is scheduled to conclude on March 1, 2018. The MPAA's strategic dilatory tactic, made by misrepresenting the law and processes that this panel of Judges has previously required be followed, will unduly prejudice Multigroup Claimants far more than any act for which IPG has previously been sanctioned. The MPAA is well aware of this fact, well aware of the consequences for refusing to engage in discovery, and the only proper remedy is to impose a discovery sanction on the MPAA on par with that previously imposed on Multigroup Claimants' predecessor, IPG.

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made despite the fact that IPG's amendment was submitted even prior to the submission of discovery requests, demonstrating that there was no cognizable benefit to IPG delaying submission of its corrected expert witness testimony.

For the foregoing reasons, the MPAA's motion to quash should be forthwith denied, and the MPAA should be ordered to immediately produce all responsive documents.

Respectfully submitted,

January 29, 2018

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th of January, 2018, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

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Certificate of Service

I hereby certify that on Monday, January 29, 2018 I provided a true and correct copy of the MULTIGROUP CLAIMANTS' OPPOSITION TO MPAA MOTION TO QUASH DISCOVERY REQUESTS OF MULTIGROUP CLAIMANTS to the following:

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